In the Supreme Court of the United States.

OCTOBER TERM, 1907.

GEORGE DICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 62.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Plaintiff in error, a Umatilla Indian, was indicted at the May term, 1905, of the United States District Court for the District of Idaho, for introducing liquor, on the 15th day of May, 1905, into the Indian country, "to wit, into and upon the Nez Perce Indian Reservation," in violation of section 2139, Revised Statutes, as amended by the act of January 30, 1897 (29 Stat., 506).

A demurrer to the indictment was interposed and overruled, and the case went to trial. The jury returned a verdict of guilty, upon which, on May 16, 1905, after overruling a motion in arrest of judgment, the court entered judgment that Dick pay a fine of $100 and costs and stand committed until the

fine was paid and that he be imprisoned in the State penitentiary for one year and ten days.

It appears from the record filed in this court in the case of *Whitney, warden of the Idaho State Penitentiary*, v. *Dick*, No. 494, October term, 1905, that Dick was incarcerated in the penitentiary in pursuance of the judgment of the district court on May 16, 1905 (p. 11), and that on August 29, 1905, he petitioned the Circuit Court of Appeals for a writ of habeas corpus and certiorari (p. 1); that that court issued a writ of certiorari to the district court, and upon the return thereto directed, October 2, 1905, that Dick be discharged for want of jurisdiction in the trial court (p. 43). The same record further shows (p. 43) that on October 31, 1905, the Circuit Court of Appeals granted the appeal to this court prayed by Whitney and stayed its judgment pending the final determination thereof, fixing bail at $1,000.

Whitney subsequently applied for a writ of certiorari from this court, which was allowed, and on April 30, 1906, this court rendered judgment upon the case as presented to it upon appeal and certiorari, dismissing the appeal for want of jurisdiction, and upon the certiorari holding that the Circuit Court of Appeals had no authority to issue a writ of habeas corpus or certiorari, and reversing its decision and remanding the case with instructions to quash the writ of certiorari issued and dismiss the petition. (202 U. S., 132.)

Application was then made for a writ of error from this court to the district court, which was allowed by

Mr. Justice McKenna and filed in the district court May 14, 1906. (Rec., 31.)

We are advised by the United States attorney at Boise, Idaho, that Dick served his term of imprisonment, took the poor debtor's oath, and was discharged, but that the fine and costs adjudged against him remain unpaid.

QUESTION PRESENTED.

The principal question raised by the assignments of error, and the only one the Government deems it necessary to notice, is that as to the jurisdiction of the trial court, which is dependent upon the constitutionality of the provision of Article IX of the agreement with the Nez Perces ratified by the act of Congress of August 15, 1894 (28 Stat., 326), subjecting the lands within the Nez Perce Reservation for a period of twenty-one years to all the laws of the United States prohibiting the introduction of liquor into the Indian country.

THE AGREEMENT.

The act of August 15, 1894 (28 Stat., 326), provides:

> SEC. 16. Whereas Robert Schleicher, James F. Allen, and Cyrus Beede, duly appointed commissioners on the part of the United States, did, on the first day of May, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Nez Perce tribe of Indians upon

the Lapwai Reservation, in the State of Idaho, which said agreement is as follows:

Whereas the President, under date of October thirty-first, e ghteen hundred and ninety-two, and under the provisions of the act of Congress entitled "An act to provide for the allotment of lands in severa ty to Indians on the various reservations, and to extend the protection of the laws of the United St.ies and the Territories over the ndians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, authorized negotiations with the Nez Perce Indians in Idaho for the cession of their surp us lands; and

Whereas the Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three:

Now, therefore, this agreement made and entered into in pursuance of the provisions of said act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and ma!e adults of the Nez Perce tribe of Indians located on said Nez Perce Reservation, witnesseth:

ARTICLE I.

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to

all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

* * * * *

ARTICLE V.

It is further stipulated and agreed that the lands by this agreement ceded shall not be opened for public settlement until trust patents for the allotted lands shall have been duly issued and recorded and the first payment shall have been made to said Indians.

* * * * *

ARTICLE VII.

It is further stipulated and agreed that all allotments made to members of the tribe who have died since the same were made, or may die before the ratification of this agreement, shall be confirmed and trust patents issued in the names of such allottees, respectively.

ARTICLE VIII.

It is further stipulated and agreed that the first per capita payment, provided for in Article VIII [III] of this agreement, shall be made to those members of the Nez Perce tribe whose names appear on the schedule of allotments made by Special Agent Fletcher and to such as may be born to them before the ratification of this agreement: * * *

ARTICLE IX.

It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject

for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

* * * * *

ARTICLE XII.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and other male adults of the Nez Perce tribe of Indians have hereunto set their hands.

Concluded at the Nez Perce Agency, this first day of May, anno Domini eighteen hundred and ninety-three.

ROBERT SCHLEICHER.
JAMES F. ALLEN.
CYRUS BEEDE.
A. B. LAWYER, AND OTHERS.

Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

ARGUMENT.

I.

As to the Jurisdiction of the Court.

The Government is desirous that the court take jurisdiction of this case, as the question of the constitutionality of Article IX of the agreement with the Nez Perces is one which the interests both of the State and the Indians require to be speedily determined.

The fact that plaintiff in error served his term of imprisonment and was released upon taking the poor-debtor's oath would not seem to amount to a complete satisfaction of the judgment, since the judgment for fine and costs still remains unpaid.

Another question which suggests itself on this record is whether the question of jurisdiction alone should have been certified to this court. There is no certificate of such question in this record, and the writ of error having been allowed and filed after the term at which the judgment was rendered, it was not competent for the District Court then to have granted such a certificate. (*Colvin* v. *Jacksonville*, 158 U. S., 456.)

But as this was a case in which the jurisdiction of the court was sustained and the case decided on its merits, and the case involved a constitutional question, it would seem that a writ of error to take up the whole case was allowable under the provision of section 5 of the Circuit Court of Appeals act relat-

ing to "any case that involves the construction or application of the Constitution of the United States." The unconstitutionality of the law under which defendant was indicted was distinctly raised in the motion in arrest of judgment (Rec., 19), and the question of jurisdiction depended upon the constitutionality of Article IX of the Nez Perce agreement.

If the defendant had not made any point as to the jurisdiction of the court, but had simply set up, as he did, in his motion, in arrest of judgment, the unconstitutionality of the statute under which he was indicted, he would undoubtedly have been entitled to come direct to this court upon the whole case.

II.

Heff case not controlling—Question one of citizenship or not.

At the trial evidence was introduced to the effect that the alleged offense was committed at the village of Cul de Sac, an incorporated town of the State of Idaho, which is located upon the land ceded by the Nez Perces to the United States. Prior to the offense this land had passed under the town-site laws to the probate judge of Nez Perce County in trust for the inhabitants of the village.

The decision of this court in the Heff case (197 U. S., 488) is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had

been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case the matter of citizenship and subjection to State authority, and not the jurisdiction retained by Congress, is really in issue.

At the time the agreement in question was made, May 1, 1893, as well as at the time it was ratified by Congress, August 15, 1894, none of the Nez Perces had received allotments in severalty. A schedule of allotments had been completed and submitted to the Land Office on May 15, 1893. This schedule, with certain exceptions, was recommended for approval by the Commissioner of Indian Affairs on March 18, 1895, and on the following day, March 19, 1895, was approved by the Secretary of the Interior, and patents for said allotments directed to issue.

There can be no dispute about these facts, as they are matters of public record. Attached to the petition for certiorari in the case of *Whitney* v. *Dick*, No. 557, October term, 1905, was a certified copy of the records of the Interior Department showing these facts, a copy of which is appended hereto. The reports of the Commissioner of Indian Affairs also show that no allotments to the Nez Perces were approved or patents issued prior to 1895. (Rep. Com. Indian Affairs, 1893, p. 23; id., 1894, p. 20; id., 1895, p. 19.)

In the report of the Commissioner of Indian Affairs for 1895 it is stated (p. 24):

> The checks for the first payment to the Nez Perces (except in cases where payment is suspended for letters of guardianship, etc.) have been transmitted to the agency for delivery to the Indians entitled thereto; also 1,575 patents to be delivered to allottees. This is in accordance with the agreement ratified by the act of August 15, 1894 (28 Stats., 286). It is expected that all preliminary requirements of the agreement [referring to the provisions of Article V] will be complied with so as to permit the opening of the ceded lands by October 1, if the Department so desires.

As, under the act of February 8, 1887, section 6, citizenship and subjection to the jurisdiction of the State does not attach until "the completion of said allotments and the patenting of the lands to said allottee," it follows that at the time the agreement was made and ratified the Nez Perces were still wards of the nation and the power of Congress to regulate commerce with them had been in no wise impaired. If the stipulations in the agreement are inconsistent with the citizenship and subjection to State jurisdiction provided by the act of 1887, it would seem that the provisions of the act must yield to those of the agreement, since the agreement is the later and more specific expression of the legislative will on the subject.

III.

It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.

At the time the agreement of May 1, 1893, was made and ratified the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By Article IX of the agreement it is, in effect, declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court.

In *Bates* v. *Clark*, 95 U. S., 204, the court, referring to the lands described as Indian country in the act of June 30, 1834, said (p. 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title it ceased to be Indian country, without any further act of Congress, *unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.*
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> So in the case of *United States* v. *Forty-three Gallons of Whiskey*, decided at the last term,

> 93 U. S., 188, where this act of 1834 was fully considered; while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it, the whole opinion goes upon the hypothesis that when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule. When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. *The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made*, by reason of the special clause to the contrary in the treaty, *though within the boundaries of a State.*
>
> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*

In *United States* v. *Forty-three Gallons of Whiskey* the court said (93 U. S., 197–198):

> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe, and they well knew that if there was no cession they were already sufficiently protected by the extent of their reservation.

Under such circumstances it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality.

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a

> treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them and give to the alien the full protection conferred by its provisions. If this result can thus be obtained, surely the Federal Government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

But, it is said, the Nez Perces, having since received their allotments, are by virtue of the act of February 8, 1887, as interpreted by the court in the Heff case (197 U. S., 488), citizens of the United States and subject to the laws of the State of Idaho. Assuming, for the purposes of the argument, that this is so, does that fact necessarily impair the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period? The stipulation in the agreement to that effect being within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, should a subsequent change in the political status of one or all of the Indians impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it?

In *United States* v. *Forty-three Gallons of Whis-*

key, supra, the court said that the power of Congress to make treaties with the Indian tribes is coextensive with its power to make treaties with foreign nations. As an illustration of the latter power the court referred to the subordination to treaty stipulations with a foreign nation of State laws regulating the right of aliens to take by descent or devise real property situate therein. The United States of course has no general jurisdiction to regulate the subject of inheritance in the States, but in pursuance of its authority to make treaties with foreign nations it could stipulate to do that which in effect amounted to such regulation, and make aliens competent to take by devise or descent. Applying that principle to the case in hand, the court held the jurisdiction of the State over the territory ceded was limited by the treaty stipulations with the Indians. The State was deemed to have accepted the grant upon the condition named, which condition was held not to be incompatible with the equal rights of the State with the other States of the Union.

It is true that in the present case we have not a treaty made by the President by and with the consent of the Senate, but simply an agreement negotiated in pursuance of and ratified by act of Congress approved by the President. That fact seems, however, immaterial. The power of the United States to deal with the Indians is the same whether exercised by law or treaty. A treaty has no superior force or sanctity to an act passed in pursuance of the Constitution. Both are equally declared to be the supreme law of

the land, anything in the constitution or laws of any State to the contrary notwithstanding. An act of Congress may repeal a treaty, and vice versa. (*Foster* v. *Neilson*, 2 Pet., 253; *Chae Chan Ping* v. *United States*, 130 U.S., 581.) Whether a given subject within the jurisdiction of the United States shall be regulated by law or treaty depends upon the exigencies of the case. But whatever the form of the exercise of the power, both are equally potent.

That Congress, in virtue of the plenary authority over the Indians, may provide for the dissolution of their tribal government and their incorporation as citizens of the United States is not open to question. And that in so doing it may attach conditions to its grant of citizenship would seem equally clear. Its power in this respect is as broad and untrammeled as the power to admit new States into the Union. Qualified citizenship is not inconsistent with the provisions of the Constitution.

In the Heff case the court held that Congress could not, *after* it had conferred citizenship upon an Indian and subjected him to the jurisdiction of the State, reassume jurisdiction over him without the consent of both himself and the State. In the present case Congress has simply provided, while the Indians concerned were still wards of the Government and as a condition of their admission to citizenship, for a retention of jurisdiction in certain matters believed to be vital to their welfare. This condition was made with the consent of the Indians themselves, and if not with the express consent at least with the

acquiescence of the State. Prior to the decision of the Court of Appeals in the Heff case, the State of Idaho never attempted to exercise any police jurisdiction over the Nez Perce Reservation or allottees so far as the introduction and sale of liquor was concerned.

This court has recognized the right of Congress to attach conditions and limitations to its grant of citizenship and subjection to State jurisdiction so far as the property of an Indian is concerned (*United States* v. *Rickert*, 188 U. S., 432; *In re Heff*, 197 U. S., 509, in which cases it was held that the property, real and personal, granted to an Indian allottee, was free from taxation by the State during the trust period).

It is to be noted that this case directly involves only so much of Article IX as relates to the lands of the Nez Perces, ceded, retained, or allotted.

In *Ex parte Viles*, 139 Fed. Rep., 68, the District Court, W. D. Washington, held, as stated in the headnote:

> The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by act August 15, 1894, 28 Stat., 330, c. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of 25 years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their

> rights of citizenship pursuant to such agreement, and can not affect the status of one who had previously acquired such rights and had become subject to State laws, so as to give force and validity as to him, to the unconstitutional act of January 30, 1897, 29 Stat., 506, c. 109, making it a crime to sell liquor to Indian allottees.

In that case, which was a habeas corpus proceeding by Viles, who had been convicted of and imprisoned for selling liquor to an Indian to whom an allotment of land had been made in the Nez Perce Reservation, the court said (139 Fed., 70):

> The sole question now to be decided is whether the conviction of the petitioner can be sustained, notwithstanding the decision of the Supreme Court in the Heff case, by reason of the ninth article of the agreement made with the Nez Perce tribe of Indians, above quoted. That agreement, having been confirmed by an act of Congress, has all the force and virtue of law, to the extent of the power of Congress to abridge the rights and privileges of Indians of the Nez Perce tribe to whom allotments of land had been previously made. So regarding it, I am unable to make any application of its provisions to affect the validity of the sentence imposed upon the petitioner. The agreement does not define any crime, nor prescribe punishment, for the act of selling liquor to a Nez Perce Indian. It was made and was confirmed by Congress long prior to the act of 1897 prohibiting the sale of intoxicating beverages to Indian allottees. The act

of the petitioner specified in the indictment as constituting the offense of selling liquor to an Indian is not criminal or punishable under any law previously enacted, and the only argument to be founded upon the treaty is this: That the stipulation in article 9 fixes the status of the Nez Perce Indians as being subject to laws to be enacted in the future, and, they being subject to the power of Congress to enact laws prohibiting the sale of intoxicating beverages, the act of 1897 affects them differently from other Indians not parties to the agreement. *Possibly this argument might be sustained if the Nez Perce Indians received their allotments and acquired the rights of citizenship pursuant to the agreement, and with the limitations assented to in the agreement itself, or by receiving allotments under its terms and conditions;* but the agreement provides for allotments only of certain land to be selected in lieu of and in exchange for allotments previously made, *and the record in this case does not show that the Indian referred to in the indictment selected or received a lieu allotment. It does not appear from the record when he did receive his allotment, and the only presumption on the subject is that his allotment had been made at a time previous to the date of the agreement, and that he was then, by virtue of the act of Congress of February 2, 1887 (24 Stat., 388, c. 119), enfranchised as a citizen of the United States, with all the rights, privileges, and immunities of citizens, and subject to the laws of the State of Idaho.* I understand the decision of the Supreme Court in the

> Heff case as a broad declaration of a fundamental principle—that Congress has no power by special legislation to classify citizens, so as to create race or other distinctions, and subject one class or grade of citizens to police regulations not applicable to all citizens, and incompatible with the reserved power of the States to enact and enforce valid local laws, *and that when an individual has once acquired the rights and privileges of a citizen, and become subject to State laws, his status can not be changed by an act of Congress without his individual consent and the concurrent assent of the State in which he resides* I therefore conclude that the agreement referred to is impotent to give force and validity to the act of 1897, upon which the judgment against the petitioner appears to be founded.

That court thus recognized the possibility of Congress attaching the conditions in question to its grant of citizenship to the Nez Perces, although indulging the erroneous assumption that the Nez Perce Indian referred to in that case had received his allotment and trust patent prior to the ratification of the agreement of May 1, 1893. As above shown, none of the Nez Perces had received trust patents for their allotments until after the ratification by Congress of the agreement of May 1, 1893, and it was not, under section 6 of the act of February 8, 1887, until the completion of the allotments and the issuance of trust patents therefor that citizenship and subjection to State authority should occur.

IV.

If the agreement of May 1, 1893, is in conflict with the act of February 8, 1887, the agreement should prevail.

The agreement states that it is made in pursuance of the provisions of the act of February 8, 1887, and so far as possible, therefore, the provisions of that act should be given effect. But in case of conflict the general provisions of the act of 1887 must give way to the special provisions of the agreement, which, having been ratified by Congress and approved by the President, has all the force and effect of a later statute.

This would unquestionably be so in the case of a conflict between different methods of allotment prescribed by the two statutes.

There can be no question as to the authority of Congress to have provided, in terms, that the Nez Perces should not, by virtue of their allotments, become citizens of the United States and subject to the laws of the State. Hence, if it has provided for a retention of jurisdiction by the United States inconsistent with the citizenship of the Indian and his subjection to State jurisdiction, it has done impliedly and indirectly no more than it could have done expressly and directly. The special provisions in the agreement on this particular subject must, it would seem, override the general provisions in the act of February 8, 1887.

The view that Congress did not intend to confer citizenship upon the Nez Perces is in accord with

its other legislation since the act of February 8, 1887, in regard to the Indians. By the act of January 30, 1897 (29 Stat., 506), it prohibited the sale of liquor to allotted Indians during the trust period, as well as the introduction of liquor upon such allotments during that period, or while a restraint on their alienation existed.

It is true that the court held the first provision unconstitutional in the Heff case. But in order to meet the situation produced by that decision Congress, by an act approved May 8, 1906 (34 Stat., 183), amended section 6 of the general allotment act of February 8, 1887, so as to provide that citizenship and subjection to State authority should not occur until an allottee had received a patent in fee simple for his allotment. Appended is a copy of H. R. Report 1558, which accompanied the bill. The Senate report (No. 1998, Fifty-ninth Congress, first session) was identically the same.

The court will observe that it is not the policy of Congress to treat all Indians alike, either in the matter of citizenship or the tenure of their lands, so that there is nothing incongruous in the view that citizenship was not intended to be conferred upon the Nez Perces.

We are advised that not only the representatives of the Government but the principal men of the Nez Perces desired the insertion of Article IX and the assurances for their protection which it contained. That theirs was no idle fear appears from the fact that since

the unauthorized decision of the Circuit Court of Appeals in this case holding that the Federal jurisdiction was at an end, there has been a general movement of the liquor people into the Nez Perce country.

Nothing was said in the agreement upon the subject of citizenship and State jurisdiction. The Nez Perces were not apparently concerned with those questions. The reports of the Commissioner of Indian Affairs show that they have little inclination to exercise the rights of citizenship with which the Supreme Court of the State has held them to be endowed. (*Wa-la-note-tke-tynin* v. *Carter*, 1898, 6 Idaho, 85, in which case, however, the agreement of 1893 was not referred to.) But they were concerned—vitally concerned—with the liquor question. Can it be that the United States is unable to carry out its compact on this subject, and that the general provisions of the act of 1887, of which the Nez Perces were doubtless ignorant, nullify the express stipulations made to them in the agreement?

In his opinion in this case, after quoting Article IX of the agreement with the Nez Perces, Judge Beatty said (Rec., 26):

> Such are the provisions of this agreement possibly bearing upon the question at issue, and there are no provisions placing such Indians under the laws of the State or making them citizens of the United States. If they are subject to such laws or have such rights of citizenship, it must be by virtue of the act of 1887 and other acts. This agreement was

"accepted, ratified, and confirmed" by Congress, which gives its provisions the same effect as any other law enacted by that body. While, as stated, this agreement recites that it is made in pursuance of the provisions of the other act, it does not follow that all of them are adopted. That act is referred to as the general authority for negotiating with the Indians for the cession of their lands, in pursuance of which this agreement is made. But it must result that any portions of such act which are in conflict with the agreement and later law must yield to it. It may be conceded that the conclusions of the court in the cited case concerning the citizenship of Indians, and their exemption from control of United States police laws and regulations, would apply also to these Nez Perce Indians, if there is no conflict between the acts referred to. While this later agreement or act makes no provision for the citizenship of such Indians, or for their control by such laws, it may still be conceded that the provisions of the other act in such matters would apply to them if their logical results, as construed by said court, would not bring them in conflict with the later law; but this later law on said agreement does provide unequivocally that all the lands within this Nez Perce Reservation shall be subject for twenty-five years to all the United States laws regulating the introduction of intoxicants thereon, and that all the Indian allottees of such reservation, whether under the care of an agent or not, shall for a like period be subject to all such laws prohib-

iting the disposition of intoxicants to Indians. This provision is too plain for doubt, and it can not be made clearer by discussion. It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to the Nez Perce Indians, and that they are neither citizens nor subject to the laws of the State, but are still the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants; but whether that result must follow, or whatever the result, it can not be conceded that this Article IX of the agreement is not to be enforced to its full letter and intent. It was a solemn agreement entered into between the Government and these Indians, who are far above the average Indians in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race. *It is well understood that this provision of the treaty or agreement was especially insisted upon by them for the protection of their people.* For them they desired and asked the intervention of the strong arm of that Government which they with unfeigned

simplicity rely upon, as the child upon its father. I can not think that this provision of a solemn compact, intended to shelter from debauch and destruction a subjected and dependent people, will be so emasculated by judicial construction as to turn loose upon them a vampire class, totally reckless of the Indians' welfare, of law, and of society. Such a result can not be made to appear to the untutored savage as consistent with our contract with them, or with honor. I feel no hesitation in holding that this agreement with the Indians must be enforced, and that this conclusion is not in conflict with the ruling cited by the Supreme Court, in which was not involved any similar statute.

V.

The State has no cause of complaint.

In the act of July 3, 1890 (26 Stat., 215), admitting Idaho as a State, nothing was said as to the Indian lands or reservations. But the constitution formed by the people of Idaho at the time of the admission of the State provided (Article XXI, sec. 19)—

> And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United

> States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*

This was simply a recognition by the State of the absolute jurisdiction of Congress over the lands of the Indians until the Indian title was extinguished—not an agreement on the part of Congress that upon the extinguishment of the Indian title such absolute jurisdiction should revert to the State. In any event, it was for Congress to determine how the Indian title should be extinguished and the State can not complain if in order to do so it was necessary or desirable to stipulate for the retention of a limited jurisdiction over said lands for a specified period, since it is the ultimate beneficiary of such action.

Moreover, the observance of stipulations of this kind is a political matter for the determination of Congress alone.

The judgment of the District Court, it is submitted, should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

WILLIAM R. HARR,
Special Assistant to the Attorney-General.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 30, 1905.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of the certificates attached to the original schedule of allotments made to the Nez Perce Indians in the State of Idaho as the same appear of record in this Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this Office to be affixed, on the day and year first above written.

[SEAL.] C. F. LARRABEE,
Acting Commissioner.

We hereby certify that the foregoing schedule of allotments (123 sheets) made by us to the Indians residing on the Nez Perce Reservation, Idaho, is correct; that each of the persons therein named is entitled to the lands allotted to him or her. And that the same were selected in accordance with the provisions of the act of Congress approved February

8, 1887, and amended and approved February 28, 1891, and the instructions of the Acting Commissioner of Indian Affairs, approved by the Secretary of the Interior.

ALICE C. FLETCHER,
U. S. Special Agent.
WARREN I. ROBBINS,
U. S. Indian Agent.

MAY 15, 1893.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
March 18, 1895.

The foregoing schedule (embracing 123 sheets) of allotments of lands in severalty made to the Indians on the Lapwai or Nez Perce Reservation in Idaho under the Act of Congress Approved February 8, 1887 (24 Stats., 388), as amended by the Act of February 28, 1891 (26 Stats., 794), by Special Agent Alice C. Fletcher and U. S. Indian Agent W. D. Robbins, under authority of the President dated April 13, 1889, and instructions from the Office approved by the Department, is respectfully submitted to the Secretary of the Interior, with the recommendation that he approve the allotments therein described (except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158,

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1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629, which are suspended) and cause patents to issue therefor in the names of the allottees as provided in the 5th section of said act of February 8, 1887.

D. M. BROWNING,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 19, 1895.

The allotments to the Nez Perce Indians in Idaho, as described in the above recommendation of the Commissioner of Indian Affairs, are hereby approved (except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629, which are suspended) and the Commissioner of the General Land Office is directed to cause patents to issue therefor (except the numbers suspended) in form and of the legal effect prescribed by the 5th section of the act of February 8, 1887.

HOKE SMITH, *Secretary.*

59TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. } REPORT No. 1558.

ALLOTMENT OF LANDS IN SEVERALTY TO CERTAIN INDIANS.

FEBRUARY 21, 1906.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 11946.]

The Committee on Indian Affairs, to whom was referred House bill 11946, submit the following report:

The committee have amended the bill and, as amended, recommend that it do pass.

The amendments adopted are as follows:

In line 9, page 1, after the word "of," strike out the words "twenty-five years or," and strike out all of line 10, and insert in lieu thereof the words "the trust period."

In line 1, page 3, after the word "time," insert the word "to."

In line 4, page 3, after the word "removed," add an additional proviso, as follows:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

This bill proposes to amend the general Indian allotment law of 1887, and changes section 6 of said act so that hereafter, whenever an allotment of land is made to any Indian, citizenship will be withheld from such Indian during the trust period. It has generally been supposed that where Indians had taken allotments under the general allotting law that they were still wards of the nation and subject to the jurisdiction only of the United States, and in cases where persons were prosecuted for selling liquor to Indians the courts assumed jurisdiction, regardless of whether the Indian had taken an allotment or not, but upon April 10, 1905, the Supreme Court of the United States decided otherwise in a case entitled "Matter of Heff," reported in 197 U. S. Reports, page 488, the opinion of the court being by Mr. Justice Brewer.

In that case Heff was convicted in the district court of the United States in the district of Kansas, under an indictment for having sold certain intoxicating liquor to an Indian and a ward of the Government; upon conviction he was sentenced to imprisonment for a period of four

months and to pay a fine of $200 and the costs of the prosecution. He appealed, and the court of appeals of the eighth circuit sustained the decision of the district court, and he presented an application for a writ of habeas corpus to the Supreme Court. In effect the court holds that under the law, when an Indian takes an allotment, that he then becomes a citizen of the State or Territory in which he may reside and subject to the laws thereof, and is no longer a ward of the nation, subject to the police regulations on the part of Congress. In concluding the opinion the court says:

> We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.
>
> The district court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice Harlan dissented.

Since this decision was rendered there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians, and in the opinion of this committee it is advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States.

The bill also provides and authorizes the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States.

In the opinion of the committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

The bill is recommended very strongly by the Commissioner of Indian Affairs and the Secretary of the Interior, and the reports are herewith submitted and are as follows:

DEPARTMENT OF THE INTERIOR,
Washington, February 14, 1906.

SIR: I am in receipt of your letter of the 16th ultimo, inclosing H. R. 11946, being "A bill to amend section six of an act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'" and in reply to your request for a report I inclose herewith copy of a letter from the Commissioner of Indian Affairs, dated the 8th instant, in which he suggests several amendments, and says that "if the bill is clarified by the amendments suggested

there appears to be no good ground for objecting to it. The provision for fee-simple patents is especially desirable legislation, and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method."

The views expressed by the Commissioner of Indian Affairs and the amendments suggested meet with my approval, and the passage of the bill is recommended.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, February 8, 1906.

SIR: I have the honor to acknowledge the receipt, by your reference of January 18, 1906, for report, of a letter from Hon. J. S. Sherman, chairman of the Committee on Indian Affairs, House of Representatives, who incloses a copy of H. R. 11946, entitled "A bill to amend section 6 of an act approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.'"

It changes section 6 to read as follows:

"That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made, and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

The act of February 8, 1887 (24 Stats., 388), known as the general-allotment act, provides that after approval of allotments the Secretary of the Interior "shall cause patents to issue therefor in the names of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period. * * *

Section 6 makes every Indian allottee under that act subject to the laws, both civil and criminal, of the State or Territory in which he may reside, immediately upon the issuance of a trust patent, and declares every Indian born within the United States, to whom an allotment shall have been made under any law or treaty, to be a citizen of the United States.

The bill under consideration postpones the time when an allottee taking lands after it is enacted is to become subject to the laws of the State or Territory of his residence and when citizenship is to be acquired until the issuance of the final or fee-simple patent—a period of twenty-five years, which may be indefinitely extended by the President.

Experience has demonstrated that citizenship has been a disadvantage to many Indians. They are not fitted for its duties or able to take advantage of its benefits.

Many causes operate to their detriment. Some communities are too indifferent and others are financially unable to enforce the local laws where Indians are involved. The result is that the newly enfranchised people are free from any restraining influences. Degraded by unprincipled whites, who cater to their weaknesses, no protection is given them, because the United States courts have no jurisdiction and the local authorities do not enforce State laws.

The bill goes further, and makes ample provision to meet all cases where it would be for the best interest of the allottees to make citizens of them. It authorizes the Secretary of the Interior, in his discretion, "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

This provision is perhaps the most important in the bill. It is a long step in the right direction, and the great need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and to take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned. Through superintendents, agents, inspectors, and other officers the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant.

In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but as a fundamental principle of good government, special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.

The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period during which any who have both the ability and the ambition may prepare themselves for the desired change.

It may be argued that the bill leaves in some doubt the status of those Indians who will be allotted after it becomes law. In cases where the surplus lands are retained and the reservation boundaries kept intact the allottees would doubtless continue wards of the Government and be subject only to the laws of the United States; whereas if the surplus lands be opened to settlement and the reservation substantially abolished, the question of jurisdiction might become a serious one. It would therefore, perhaps, be well to add the following proviso:

"*Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The first part of amended section 6 will not make allottees subject to the laws of the State in which they reside in any case until the expiration of twenty-five years. The proviso to that section contemplates the shortening of the trust period and removes all restrictions as to the sale, incumbrance, or taxation on the issuance of a fee-simple patent. A previous provision of the section makes such patentees citizens of the United States. Although it would probably be held that a person who becomes a citizen of the United States thereby becomes subject to the laws of the State of which he is a resident, I think it would be wiser to remove all doubt by amending the first section by striking out the words "twenty-five years or thereafter, if the period has been extended by the President," and insert in lieu thereof the words "the trust period." Line 1, on page 3, also should have the word "to" inserted after the word "time."

If the bill is clarified by the amendments suggested there appears to be no ground for objecting to it. The provision for fee-simple patents is especially desirable legislation and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method. It is therefore most heartily recommended that this bill receive your approval.

Very respectfully,

F. E. LEUPP, *Commissioner.*

THE SECRETARY OF THE INTERIOR.

O

DICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 62. Submitted December 3, 1907.—Decided February 24, 1908.

While a State, upon its admission to the Union, is on an equal footing with every other State and, except as restrained by the Constitution, has full and complete jurisdiction over all persons and things within its limits, Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of the State within whose limits are Indian tribes.

Where fundamental principles of the Constitution are of equal dignity, neither must be so enforced as to nullify or substantially impair the other.

While the prohibition of § 2139, Rev. Stat., as amended in 1892, against introducing intoxicating liquors into Indian country does not embrace any body of territory in which the Indian title has been unconditionally extinguished, that statute must be interpreted in connection with whatever special agreement may have been made between the United States

and the Indians in regard to the extinguishment of the title and the retention of control over the land ceded by the United States.

It is within the power of Congress to retain control, for police purposes, for a reasonable and limited period, over lands, the Indian title to which is extinguished, and which are allotted in severalty, notwithstanding that the Indians may be citizens and the land may be within the limits of a State; and twenty-five years is not an unreasonable period.

Under the agreement of May 1, 1893, ratified, 28 Stat. 286, 326, between the United States and the Nez Perce Indians, the United States retained control over the lands ceded for the purpose of controlling the use of liquor therein for twenty-five years, and during that period § 2139, Rev. Stat., remains in force, notwithstanding such lands are within the State of Idaho.

By indictment returned in the District Court of the United States for the District of Idaho, the plaintiff in error, Dick, was charged with the offense of having unlawfully and feloniously introduced intoxicating liquor, whiskey, into the Indian country, to wit, into and upon the Nez Perce Indian Reservation, in the county of Nez Perce, State of Idaho.

The indictment was based upon § 2139 of the Revised Statutes as amended and reënacted by the act of July 23, 1892, 27 Stat. 260, c. 234. That amended section reads: "No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the *Indian country*. Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the *Indian country* shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. . . ."

The accused demurred to the indictment upon the following

among other grounds: That at the time charged in the indictment there was no Indian country within the county of Nez Perce or within the District of Idaho, known or designated as the Nez Perce Indian Reservation; that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as the Nez Perce Indian Reservation was, by the act admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the State, been extinguished by the allotment of the lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that such allotments and purchase have been ratified by the public laws and acts of Congress; and further, that the former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in the indictment, been opened for occupation, settlement and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in the indictment, settled and appropriated by citizens of the State; that various townsites within the boundaries of the former reservation had been settled by citizens and that title thereto transferred from the United States to the inhabitants, and that municipal governments, namely, villages, had been organized and were in existence within the boundaries of the former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in the indictment, Indian country, or lands reserved for the use and occupation of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the au-

thority or control in nature of the guardianship of the person. Other grounds of demurrer were assigned, but they need not be here set out.

The demurrer was overruled, and the case went to trial, the accused pleading not guilty. At the close of the evidence he asked the court to direct a verdict of not guilty, but that request was denied and the result of the trial was a verdict of guilty. Motions for arrest of judgment and for a new trial having been denied, the defendant was, on May 16, 1905, sentenced to pay a fine of $100 and costs and to be imprisoned in the penitentiary for the term of one year and ten days.

In order that the grounds of the demurrer may be clearly apprehended it is necessary to bring into view certain legislation by Congress and an agreement or treaty made between the United States and the Nez Perce Indians.

By the act of Congress of February 8, 1887, c. 119, providing for the allotment of lands in severalty to Indians on the various Indian reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same, by patent, to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above